

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JORGE G. CHAVEZ D/B/A</b>	:	
<b>LORIS OLD FASHIONED ICE CREAM FOUNTAIN</b>	:	DETERMINATION
	:	DTA NO. 813879
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period March 1, 1990 through August 31, 1992.	:	

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Petitioner, Jorge G. Chavez d/b/a/ Loris Old Fashioned Ice Cream Fountain, 37A Main Street, East Hampton, New York 11937-2701, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1990 through August 31, 1992.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 22, 1996 at 1:15 P.M., with all briefs to be submitted by August 29, 1996. By letter dated November 6, 1996, the Division of Taxation requested that the determination in this matter be held in abeyance pending the filing by petitioner of an application under the Division's tax amnesty program. By letter dated February 6, 1997 and received by the Division of Tax Appeals on February 7, 1997, the Division advised that the parties would not be settling this matter. February 7, 1997 thus began the six-month period for the issuance of this determination. Petitioner appeared by Louis F. Brush, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel).

***ISSUE***

Whether petitioner has shown error in the Division of Taxation's calculation of additional tax due herein.

***FINDINGS OF FACT***

1. On November 15, 1993, following an audit, the Division of Taxation ("Division")

issued to petitioner, Jorge G. Chavez d/b/a Loris Old Fashioned Ice Cream Fountain, a Notice of Determination of sales and use taxes which assessed a total amount due of \$70,032.73 for the period March 1, 1990 through August 31, 1992. This total amount due was comprised of \$38,402.71 in tax, plus penalty and interest in the respective amounts of \$19,476.80 and \$12,153.22.

2. Petitioner was the sole proprietor of a business known as Loris Old Fashioned Ice Cream Fountain located at 37A Main Street, East Hampton, New York. Petitioner's business sold hard and soft-serve ice cream and yogurt by the cone and dish. Petitioner also sold pints and quarts of ice cream and yogurt for off-premises consumption, as well as a relatively small amount of baked goods, candy and coffee. The business was open from noon to 10:00 P.M. seven days a week. Most of petitioner's sales occurred in the summer months.

3. The Division began the audit by requesting the production of all of petitioner's books and records related to his sales tax liability from the start of his business to August 31, 1992. This request was made by letter dated August 19, 1992. At the time the Division's request was made, the Division was in possession of a notification of bulk sale dated March 20, 1990 which listed petitioner as one of two individuals purchasing the business located at "37[sic] Main Street, East Hampton, New York." The bulk sale notification also indicated August 31, 1990 as the seller's last day of business. However, the auditor concluded, based on petitioner's purchase records, that petitioner started his business in May 1990.

4. In response to the Division's request for records, petitioner produced worksheets indicating taxable and nontaxable sales, purchases, operating expenses, selling prices, markup ratios and net profits. Petitioner also produced his purchase invoices for the audit period and, except for two months of the audit period, his monthly bank statements. Petitioner did not produce any records of individual sales (i.e., receipts, guest checks, or cash register tapes). Petitioner also did not produce a sales journal or general ledger, or any Federal income tax returns for the years at issue.

5. Petitioner did not file sales tax returns for any quarter in the audit period.

6. Petitioner did not register as a vendor for sales tax purposes until June 1992.

Petitioner was thus operating without a Certificate of Authority to collect sales tax from May 1990 until June 1992.

7. Petitioner's worksheets calculated petitioner's sales by taking the number of cans of hard and soft-serve ice cream and yogurt purchased during the audit period and converting that number into gallons. The worksheets indicate that some brands were purchased by petitioner in 3 gallon cans and others in 2½ gallon cans. With respect to purchases of soft-serve ice cream and yogurt the worksheets increased the number of liquid gallons purchased by a 25% "air overrun" factor to reach a total "saleable product" gallonage figure. Total gallons of both hard and soft-serve ice cream and yogurt were then multiplied by 128 to arrive at total number of ounces available for sale. From these totals certain adjustments were made for waste, free samples and employee consumption. Petitioner's worksheets also set forth percentages of hard ice cream/yogurt sales versus soft-serve ice cream/yogurt sales and taxable (cones and dishes) versus nontaxable (pints and quarts) sales. Petitioner's worksheets also indicated that petitioner's taxable sales were made in six and nine ounce portions and that 80% of such sales were six ounce portions. The worksheets also listed petitioner's selling prices for the six and nine ounce portions. The worksheets listed monthly totals of petitioner's taxable and nontaxable sales from May 1990 through August 1992.

8. Upon review of the purchase invoices and worksheets and after a brief observation, the auditor accepted the accuracy of the taxable sales figures as set forth in the worksheets. He thus calculated additional tax due on petitioner's sales for the audit period based directly on taxable sales as listed in the worksheets. The additional tax due on sales totaled \$38,027.71.

9. As noted previously, petitioner purchased his ice cream business in a bulk sale transaction. The bulk sale notification indicated that furniture, fixtures, equipment and supplies valued at \$5,000.00 were sold to the purchasers as part of the bulk sale. No sales tax was paid

on these assets at the time of the bulk sale. Accordingly, on audit the Division asserted tax due of \$375.00 on petitioner's purchase of this \$5,000.00 of assets.

### ***CONCLUSIONS OF LAW***

A. Petitioner did not contest the reasonableness of the audit method used by the Division in this case (see, Matter of W.T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869). This is not particularly surprising since the Division calculated additional tax due on sales based on sales figures set forth in petitioner's own worksheets. Petitioner did contend that the Division made an error in its calculations. Specifically, petitioner asserted that the Division had improperly calculated the amount of hard ice cream and yogurt available for sale by volume. Petitioner asserted that the correct manner of calculating the amount of hard ice cream and yogurt available for sale would be by actual weight. Petitioner bears the burden of proof with respect to this contention (see, Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681).

B. Petitioner's contention is rejected. The calculations set forth in petitioner's workpapers show purchases of cans of hard ice cream and yogurt converted to gallons and then to ounces by multiplying the number of gallons purchased by 128, i.e., the number of ounces in a gallon. Following certain adjustments, petitioner's calculations eventually reach taxable ounces available for sale, which are then converted to six and nine ounce portions at selling prices as provided in the workpapers. The workpapers thus do not even suggest that petitioner sold hard ice cream and yogurt by weight. Clearly, the term "ounces" as used in the workpapers refers to volume and not to weight. Petitioner did not testify at the hearing and thus there is no explanation in the record for the discrepancy between petitioner's workpapers as presented on audit and petitioner's position as articulated at hearing.

Also at hearing petitioner submitted revised computations of his tax liability prepared by petitioner's representative which were premised on sales of hard ice cream and yogurt by weight. Specifically, these revised calculations converted purchases of cans of hard ice cream

and yogurt into pounds. A can was assigned a weight of 12 or 15 pounds depending upon the brand. Pounds were then converted into ounces by multiplying by 16. Given the lack of evidence in the record supporting petitioner's claim that petitioner made sales of hard ice cream and yogurt by weight, these revised computations are properly given little weight herein. Moreover, even if the record did contain some evidence supporting petitioner's position that hard ice cream and yogurt were sold by weight, there is no evidence supporting the pounds per can amounts upon which petitioner's calculations rely.

Accordingly, there is no basis upon which to make any adjustment to the tax as assessed by the Division herein.

C. Petitioner made several allegations in his petition which were not addressed either at the hearing or in his brief. Specifically, the petition alleged that the assessment was arbitrary and was made without a review of petitioner's records; that petitioner's books and records were complete and accurate; that any additional tax due was not the result of negligence; that the interest rate should be reduced to the minimum; that the assessment is erroneous as a matter of law; and that petitioner was not an individual responsible for the tax assessed herein. Since petitioner did not address these allegations either at hearing or on brief, they are deemed abandoned and will not be addressed (see, Bello v. Tax Appeals Tribunal, 213 AD2d 754, 623 NYS 2d 363, 364 n.3). Moreover, even if not abandoned, these allegations are clearly without merit.

D. The petition of Jorge G. Chavez d/b/a Loris Old Fashioned Ice Cream Fountain is in all respects denied and the Notice of Determination dated November 15, 1993 is sustained.

DATED: Troy, New York  
July 17, 1997

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE